IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVANIA GARDENS APARTMENTS RJS SHERWOOD ASSOCIATES	:	CIVIL ACTION
v.	:	
HARTFORD FIRE INSURANCE COMPANY	:	NO. 98-5870

MEMORANDUM AND ORDER

HUTTON, J. June 8, 2000

Presently before the Court is Plaintiffs' Motion for Summary Judgment, Defendant's Cross-Motion for Summary Judgment, and the parties' oppositions thereto. For the reasons stated below, the Court grants Plaintiffs' Motion in part and denies Defendant's Motion.

I. BACKGROUND

This is an insurance coverage case arising from a December 19, 1996, fire at the Sherwood Court Apartments, located in Philadelphia, Pennsylvania. (See Stipulation of Facts ¶¶ 1, 17). At the time of said fire, the property was insured by the Insurance Company of the State of Pennsylvania (hereinafter "underlying policy") in the amount of $500,000. (See Stipulation of Facts ¶ 12). Additionally, said property was insured by Defendant Hartford Fire Insurance Company under an excess policy (hereinafter "excess policy") in the amount of $28,913,000. (See Stipulation of Facts ¶ 9). The named insureds under the excess

policy were Sylvania Gardens Apartments and RJS Pacific Associates. (See Stipulation of Facts ¶ 3). The policies also provided for scheduled coverage of Sherwood Court, Sylvania Gardens, Spruce Manor, and RJS University properties. (See Stipulation of Facts ¶ 4). RJS is a sole proprietorship and is the management company for all the above mentioned properties. (See Stipulation of Facts ¶ 5). Although each property has a different combination of owners, Robert J. Swarbrick is the principal/controlling owner of each of the scheduled properties. (See Stipulation of Facts ¶¶ 6-8).

Following the exhaustion of the underlying policy's coverage, Plaintiffs made a claim under the excess policy for damages resulting from said fire and for the resulting lost income. (See Stipulation of Facts ¶¶ 19-32). This action arises from Defendant's withholding of deprecation upon payment of the partial fire loss sustained at the Sherwood Court property, in addition to Defendant's refusal to pay an additional $32,880 for claimed lost income with respect to tenants who were relocated from Sherwood Court to other apartments located at Sylvania Gardens, Spruce Manor, and RJS University properties. (See Stipulation of Facts ¶¶ 33-40). It is undisputed that Plaintiffs did not repair or contract to repair the damaged property, and have since sold the Sherwood Court property. (See Stipulation of Facts ¶¶ 28, 38).

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-movant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless,

a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

The principles governing the interpretation of an insurance contract under Pennsylvania law are well settled. See Altipenta, Inc. v. Acceptance Ins. Co., No. CIV.A.96-5752, 1997 WL 260321, at *2 (E.D. Pa. May 14, 1997), aff'd, 141 F.3d 1153 (3d Cir. 1998) (unpublished table decision). The court generally performs the task of interpreting an insurance contract. See Allstate, 834 F. Supp. at 856. The court must read the policy as a whole and construe it according to the plain meaning of its terms. See Bateman v. Motorists Mut. Ins. Co., 527 Pa. 241, 590 A.2d 281, 283 (Pa. 1991). Further, as this is a diversity matter, the Court is required to follow the decisions of the Supreme Court of Pennsylvania in considering matters of Pennsylvania state law. See Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465 (1967). Additionally, " 'an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.' " Id.

III. DISCUSSION

A. Deprecation of a Partial Loss

After deducting the coverage provided by the underlying policy and the applicable deductible, Defendant paid Plaintiffs' partial fire damage claim in the net amount of $3,195,711.34. (See Stipulation of Facts ¶ 24). The actual replacement value of the damaged portion of the property is stipulated to be $4,120,263.23. (See Stipulation of Facts ¶ 23). It is also stipulated that $419,551.89 represents the amount of deprecation applicable to the damaged portion Plaintiffs' property. (See Stipulation of Facts ¶ 26). Thus, the calculation of Plaintiffs' net proceeds reflects a $419,551.89 reduction for deprecation. (See Stipulation of Facts ¶¶ 23-27). Plaintiffs now claim that this reduction is contrary to Pennsylvania law, thereby entitling them to additional compensation in the amount of said deprecation reduction.

In resolving this conflict the Court starts with the plain language of the insurance policy issued by Defendant. This policy explicitly states in its insuring clause that "[s]ubject to the terms and conditions of this policy and its endorsements the Company shall be liable for loss or damage insured by the terms and conditions of the Underlying Insurance policy . . . ." (See Excess Property Form at 1). As no terms, conditions, or endorsements contained in the excess policy address the determination of payment for a partial loss, the Court must look to the terms, conditions, and endorsements of the underlying policy issued by the Insurance Company of the State of Pennsylvania.

Defendants, assert that said underlying policy explicitly provides for a deprecation deduction when the insureds do not effectuate repairs of the damaged property, thereby providing a payment of "actual cash value (with depreciation)," rather than "replacement costs (without depreciation)."[1] Plaintiffs, however, do not make a claim pursuant to the "Replacement Cost" option contained within the underlying policy, rather Plaintiffs assert a claim under the "Standard Fire Policy Provisions" contained in the underlying policy as an endorsement. (See Standard Fire Policy Endorsement to Underlying Policy at 1). As such, Plaintiffs claim that they are entitled to the "actual cash value" of the loss without a deduction for deprecation pursuant to Pennsylvania law.

The underlying policy's fire policy endorsement states in relevant part that:

> The provisions of the Standard Fire Policy are stated below. State law requires that they be attached to all policies. If any conditions of this form are construed

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[1] Paragraph (G)(3) of the underlying policy concerning replacement cost states in relevant part that:

> a. Replacement Cost (without deduction for depreciation replaces Actual Cash Value, in the Loss Condition, Valuation, of this Coverage Form.
>
> c. You may make a claim for loss or damage covered by this insurance on an actual cash value basis instead of a replacement cost basis . . . .
>
> d. We will not pay on a replacement cost basis for any loss or damage:
>
> (1) Until the lost or damaged property is actually repaired or replaced; and
> (2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

(See Building and Personal Property Coverage Form of Underlying Policy ¶ (G)(3)).

> to be more liberal than any other policy conditions relating to the perils of fire, lighting or removal, the conditions of this form will apply. (emphasis added)
> . . . [the insurance company] does insure . . . to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss . . . .

(See Standard Fire Policy Endorsement to Underlying Policy at 1).

Upon reviewing the above endorsement language, it is clear that such endorsement materially affects the nature of coverage provided under the underlying policy, whereby the endorsement language explicitly supersedes other policy conditions when the endorsement language is deemed to be more liberal. Consequently, such condition affects the obligations of Defendant under its excess policy which explicitly incorporates the terms and conditions of the underlying policy. (See Excess Property Form at 1).

In Farber v. Perkiomen Mut. Ins. Co., 88 A.2d 776 (Pa. 1952), the Supreme Court of Pennsylvania considered a substantially identical insuring clause to the above endorsement's language when it determined that in the context of a partial loss, a deduction for depreciation could not be taken from the cost of new material necessary to return the property to its pre-fire condition. See Farber, 88 A.2d at 779. The Court reasoned that such a rule was necessary "to make the plaintiff whole as far as possible for the cost of restoring the building to its prior use up to the amount of the insurance in the policies." Id. at 780.

Thus, this Court's reading of Farber stands for the proposition that in the context of a partial loss, under the language of a Pennsylvania Standard Fire Policy, an insurance company in circumstances as presented in the instant action cannot deduct depreciation from the cost of repairs necessary to restore the building to its original condition when paying "actual cash value." Such a conclusion has also been reached by other courts addressing this issue. See Perschau v. USF Ins. Co., No. CIV.A.97-7801, 1999 WL 162969, at *4 n.6 (E.D. Pa. Mar. 22, 1999) (stating Pennsylvania does not allow a partial loss to be depreciated under standard fire policies); see also London v. Ins. Placement Facility of Pennsylvania, 703 A.2d 45, 50 (Pa. Super. Ct. 1997) ("The Farber decision arguably prevents insurance companies from deducting depreciation in the event of a partial loss that does not exceed the depreciated value of the whole property. If the companies wanted to avoid such a result, the court plainly suggested that they should modify their policies.")

Despite the above, Defendant states that Farber does not stand for the proposition that depreciation is unavailable in a partial loss case based upon a recent unpublished opinion in Gatti v. McDevitt, No. 2469 Philadelphia 1998 (Pa. Super. Ct. Oct. 12, 1999). (See Def.'s Opp. to Pl.'s Mot. for Summ. J. at 5). This Opinion states that "the court finds that Farber does not stand for the proposition that in a partial loss case, actual cash value is

defined as allowing the policy holder to recover depreciation." See Gatti, No. 2469 Philadelphia 1998, at 5 n.3. First, this Court notes that such a statement appears in direct conflict with the prior statement of the court when it concluded that Farber "arguably prevents insurance companies from deducting depreciation in the event of a partial loss." See London, 703 A.2d at 50; see also Perschau, 1999 WL 162969, at *4 (Eastern District Opinion). Second, this Court is bound by the law as spoken by the Pennsylvania Supreme Court, not that of an intermediate level court as Defendant suggests. (See Def.'s Opp. to Pl.'s Mot. for Summ. J. at 5). As such, the Court's reading of Farber remains unaffected by the unpublished Gatti Opinion; rather the Court finds the statement of the Superior Court in London and specifically the Pennsylvania Supreme Court's reasoning in Farber controlling on the issue of depreciation in a partial loss situation.

Defendant also asserts that the depreciation limitation announced in Farber is inapplicable because Defendant's policy is not a "Standard Fire Insurance Policy" and that it does not contain the language that was at issue in Farber. (See Def.'s Opp. to Pl.'s Mot. for Summ. J. at 6, 9). The Court finds both of these positions to be without merit.

First, although the excess policy does not contain the Farber language, the insuring clause of this policy explicitly includes the terms and conditions of the underlying policy. (See

Excess Property Form at 1). Consequently, the standard fire policy endorsement in the underlying policy is explicitly incorporated into Defendant's obligation to the insureds and is properly applied to Defendant by the plain meaning of its own insuring clause. Defendant further cites Perschau as dispositive on the issue of whether or not this matter concerns a standard fire policy. (See Def.'s Opp. to Pl.'s Mot. for Summ. J. at 10). However, the policy which is the subject matter of the instant dispute does not contain an explicit endorsement defining "actual cash value" as was contemplated by the Perschau court. See 1999 WL 162969, at *4 n.6 (citing London, 703 A.2d at 49 (stating that the policy contained an endorsement defining "actual cash value."")). As such, the Court finds Defendant's argument unpersuasive and out of context.

Second, given the above discussion and the instant matter's substantially identical language to the language discussed in Farber, the analysis of the Farber court is applicable to this dispute. See Farber, 88 A.2d at 779; (see also Standard Fire Policy Endorsement to Underlying Policy at 1). Had Defendant wished to avoid this result it simply need to define the method which would be used to define "actual cash value" in a partial loss situation within the terms of the excess policy it issued to the insureds. See Farber, 88 A.2d at 780 (stating that if defendants wish to bring about a different result they will have to change the terms of their policies to achieve that end); see also London, 703 A.2d at 50. As

a result of the forgoing, the Court finds that no genuine issue of material fact exists with respect to Defendant's inability to deduct depreciation from the cost of repairing Plaintiffs' partially damaged property. As such, the Court grants summary judgment in Plaintiffs' favor, finding that Plaintiffs are entitled to an additional stipulated amount of $419,551.89 in withheld depreciation. (See Stipulation of Facts ¶ 26). Further, the Court finds it of no consequence that Plaintiffs no longer own said property, as any existing and unrepaired damage would have obviously affected the property's resale value.

B. Payment of Disputed Lost Income

Plaintiffs also claim entitlement to additional compensation in the amount of $32,880, based upon the lost rents of twenty (20) tenants which were displaced from their Sherwood Court apartments and relocated to other properties also covered under the terms of the excess policy after the December 19, 1996, fire. Defendant asserts that such argument is without merit as the underlying policy will pay lost income only to the extent that such claim is based upon an "actual loss of Business Income . . . ." (See Insurance Business Income Coverage Form of Underlying Policy ¶(A)(III); see also Def.'s Mot. for Summ. J. at 12). Defendant further asserts that because these twenty tenants were relocated to properties also covered under the policy, no actual loss was incurred by insureds, therefore no lost income was actually

realized. (See Def.'s Mot. for Summ. J. at 13). Plaintiffs, however, maintain that each property is a separate entity, thereby making the relocation of said tenants to other properties irrelevant to the loss sustained at the Sherwood Court Apartments. (See Pl.'s Mot. for Summ. J. at 12-13). In support of this conclusion, Plaintiffs cite at length legal concepts on piercing the corporate veil and partnership/corporate independence. (See Pl.'s Mot. for Summ. J. at 13-16). Such arguments by Plaintiffs, however, do not address the fact that the disputed business income has not technically been lost, but rather shifted to and earned by other properties which are also insured under the excess policy issued by Defendant. Consequently, Plaintiffs would have the Court take a highly narrow and technical view of their claim, rather than one which accounts for the reality of the attended circumstances.

As recently noted by the Third Circuit Court of Appeals, "[c]ourts must examine the totality of the insurance transaction involved to ascertain the reasonable expectation of the insured." See Bowersox Truck Sales and Serv. v. Harco Nat'l Ins. Co., 209 F.3d 273, 278 (3d Cir. 2000) (citing Everett Cash Mut. Ins. Co. v. Karawitz, 633 A.2d 215, 216 (Pa. Super. Ct. 1993)). As such, upon reviewing the terms and conditions of the policies relevant to this matter the Court finds Plaintiffs' position to be unreasonable, in as much as they assert entitlement to the "full" amount of rental income without consideration of the income received through the

relocation of the tenants impacted by the Sherwood Court fire. To find otherwise would essentially permit Plaintiffs to recover income beyond the scope of the compensatory coverage clearly contemplated by the underlying policy's business income loss coverage. (See Insurance Business Income Coverage Form of Underlying Policy ¶(A)(III)). The reality is that the disputed lost income was not actually "lost income," but rather said income was merely shifted to and earned by alternative insured properties.

Nevertheless, the above conclusion is not dispositive in deciding Plaintiffs' claim as the question which remains unanswered is whether or not Plaintiffs suffered an "actual loss of business income." Upon reviewing the parties' motions and submitted evidence, the existence of an "actual loss" of income remains unclear and reasonably disputed. For example, the relocated tenants obviously preluded the rental of the impacted apartments to other prospective tenants. Consequently, Plaintiffs may have suffered lost rental opportunity when viewing the properties collectively. Such circumstance is not beyond the scope of the policy's coverage as "Business Income" is defined as "[n]et income . . . that would have been earned or incurred. . . ." (See Business Income Coverage Form of Underlying Policy ¶(A)(III)(1)(a)). There is, however, insufficient evidence before the Court to make such a determination. As such, the Court finds that genuine issues of material fact remain unresolved and summary judgment is inappropriate.

An appropriate Order follows.

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v.	:	
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O R D E R

AND NOW, this 8th day of June, 2000, upon consideration of Plaintiffs' Motion for Summary Judgment (Docket No. 22), Defendant's Cross-Motion for Summary Judgment (Docket No. 23), and any opposition thereto, IT IS HEREBY ORDERED that:

(1) Summary Judgment is **GRANTED** in favor of Plaintiffs and against Defendant in the amount of $419,551.89; the interest thereon, if any, to be determined by motion filed within twenty (20) days of the date of this Order;[1]

(2) Summary Judgment is **DENIED** with respect to Plaintiffs' claim for lost business income;

(3) Defendant's Cross-Motion for Summary Judgment is **DENIED;**

(4) Plaintiff's Bad Faith (Count Two) is **DISMISSED WITH PREJUDICE** pursuant to the parties' stipulation.[2]

BY THE COURT:

_____
HERBERT J. HUTTON, J.

[1] Plaintiffs' motion contains no support for or calculation of the interest requested on their claim. As such, the Court will consider the awarding of such interest upon separate motion.

[2] (See Stipulation of Facts ¶¶ 36-37).